

Acquittals at the International Criminal Tribunal for the former Yugoslavia (ICTY) in 2012-2013: the domestic implications

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Abstract

From November 2012 to May 2013, the International Criminal Tribunal for the Former Yugoslavia (ICTY) rendered its verdicts in four trials involving eight former Croatian, Kosovo, and Serbian military, police and intelligence officials. These acquittals drew the attention of politicians, human rights organisations and victims' associations, each for different reasons. This article focuses on internal political contexts in Croatia, Serbia and Kosovo, following the return of the acquitted officials to their countries. It analyses the use of these verdicts by domestic political elites to legitimise their exclusive narratives of war and shows that these verdicts will be used to achieve goals quite different from those envisaged by international tribunals. The reactions to the acquittals will be analysed as a manifestation of conflicting national political contexts, resulting from a combination of multiple factors between local, national and international actors.

Key words: transitional justice, International Criminal Tribunal for the Former Yugoslavia, acquittals, Gotovina, Perišić, Stanišić, Haradinaj.

Introduction

In 2012-2013, the International Criminal Tribunal for the former Yugoslavia (ICTY) acquitted eight former Croatian, Kosovo and Serbian military, police and intelligence chiefs. These acquittals started on 16 November 2012, when the ICTY acquitted the former chief commander of the Croatian Army Ante Gotovina and the former commander of the Croatian Special Police Mladen Markač. Two weeks later, the Tribunal acquitted Ramush Haradinaj, one of the former commanders of Kosovo Liberation Army (KLA). In February 2013, Momčilo Perišić, the former chief of General Staff of the Serbian Army from 1993-1998, was acquitted too. In May 2013, two more were acquitted: Jovica Stanišić, the former head of Serbia's Intelligence services in the 1990s, and his deputy Franko Simatović. In December 2015, this last verdict was quashed by the Appeals Chamber of the ICTY, which ordered a retrial on all counts of the indictment.

In Croatia, the acquittals of Gotovina and Markač were interpreted as verdicts that confirmed "that the Croatian military operation *Storm* in 1995 was legal and that no crimes against humanity ever took place" (Subotić, 2014, p.171). In this country, the Tribunal has longtime been considered "an institution that undermined state sovereignty and challenged the national narrative of Croatia as a victim country that had, against great odds, won a clean and glorious war of independence" (Peskin, 2008, p.120).

In Serbia, where the ICTY has for a long time been considered an anti-Serb institution, "serving the interests of powerful states and those of the United States in particular" (Lamont, 2010, p. 75), Perišić's acquittal (as well as those of Stanišić and Simatović two months later) were presented "as welcome evidence of the separation of wartime Serbia and Bosnian Serbs, a political point Serbian politicians have argued since the mid-1990" (Subotić, 2014). For Serbian political elites, these acquittals "confirmed" Serbia's non-implication in wars in Bosnia and Croatia.

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The acquittal of Ramush Haradinaj “fit neatly with the dominant narrative of the past in Kosovo, where KLA is understood as a liberation force that fought for justice and independence from decades of brutal Serbian repression” (Subotić, 2014).

The aim of this article is to analyse the use of the acquittals by domestic politicians to strengthen the mutually exclusive “truths” about war and their national narratives. In most of the countries of former Yugoslavia, denouncing the ICTY has been a way for nationalists to mobilise people and fight governments. Although the acquittals strengthened the victims’ belief that the ICTY “capitulated” and that the trials failed to bring justice to them, the acquitted officials in Croatia and in Kosovo held rallies to promote themselves as the great winners and “martyrs who embody the victimhood of the their nation.”¹ Then, through an analysis of the background contexts of each case individually, in particular that of indictments, the paper analyses how domestic politicians in Serbia, Croatia and Kosovo, who came to power after 2000, failed to promote transitional justice in their countries and used the compliance with the ICTY as an opportunity to try to achieve other political goals, such as getting rid of their political opponents or obtaining economic assistance. Slobodan Milošević was delivered to The Hague on the eve of a donors conference where Serbia’s participation was conditioned upon Milošević’s delivery to The Hague. Gotovina’s arrest in Canary Islands in 2005 and his transfer to The Hague unblocked Croatia’s EU accession negotiations. According to Kerr (2007, p. 379), indictments were also an opportunity to get rid of the “undesirables” from the former regime, whose continued presence in their countries could put the new governments at risk. “The tribunal fulfilled one of the purposes of justice by simply removing dangerous criminals from the region where they had occupied positions of leadership.”² Describing this as an important role of the Tribunal, Orentlicher (2008, p. 17) observed that when it came to Serbian leaders who were transferred to The Hague, including former President Slobodan Milošević, “it was good not to have them around, at all levels.”

The acquittal of Ante Gotovina

The acquittal of Ante Gotovina and Mladen Markač was headline news for all media in Croatia, Bosnia-Herzegovina and Serbia. As the highest Croatian military and police commanders, Gotovina and Markač had been indicted by the ICTY in 2001 for crimes committed by the Croatian forces against the Croatian Serbs in 1995, during and after operation Storm (*Oluja*), which marked the return of the Krajina region to Croatia. In April 2011, the Trial chamber of the ICTY had convicted Gotovina and Markač to 24 and 18 years in prison. The acquittal by the Appeals Chamber of the ICTY was greeted with joy in Zagreb and rancour in Belgrade. Ian Traynor wrote for *The Guardian* that it seemed like the Croatians “beat the Serbs fair and square.”³ Reactions in Serbia were particularly strong, with many accusing the ICTY of being unable to punish crimes against Serbs. The Serbian president made a statement, saying that “this decision of The Tribunal legalizes terrible crimes committed against Serbs in the operation *Storm* in 1995” and that this “is a scandal worse than injustice.”⁴ There were also strong international reactions to the results. The former Chief Prosecutor of the ICTY Carla Del Ponte, who had deployed huge efforts to bring Gotovina to the court, declared that “this was surely not justice and that it represented a turning point for the Tribunal” (Gow, Kerr & Pajic, 2014, p. 32). Del Ponte said that she had expected a reduction of Gotovina’s sentence, but certainly not an acquittal.

The Croatian leadership gave particular importance to the verdict of the ICTY on Gotovina, considering the Joint Criminal Enterprise (JCE). The Croatian President Ivo Josipović declared that

1 Stefja, I. (2016, July). *The war criminal cult: Karadžić and Šešelj at The Hague*. Retrieved from <http://web.isanet.org/Web/Conferences/CEEISA-ISA-LBJ2016/Archive/5dd32adc-fd1b-4d2f-986e-89ab63550220.pdf>

2 Borger, J. (2016, March 23). The Radovan Karadzic war crimes trial is Europe’s biggest since Nuremberg. *The Guardian*. Retrieved from <https://www.theguardian.com/commentisfree/2016/mar/23/radovan-karadzic-trial-nuremberg-guilty-tribunal-mass-atrocities>

3 Traynor, I. (2016, November 16). Croatia’s “War crime” is no longer a crime after UN tribunal verdict. *The Guardian*. Retrieved from <https://www.theguardian.com/world/2012/nov/16/croatia-war-crime-analysis>

4 PM, president: Hague makes political decisions. (2012, November 16). *B92*. Retrieved from https://www.b92.net/eng/news/politics.php?yyyy=2012&mm=11&dd=16&nav_id=83189

the acquittal confirmed that Croatia did not commit ethnic cleansing and that “the Croatian leadership and armed forces did not act as a Joint Criminal Enterprise whose goal was the persecution of civilians, our Serb compatriots.”⁵ It is on these bases that Carla Del Ponte was blamed for not having built up Gotovina’s case seriously because she was much more focused on implicating the deceased former Croatian President Franjo Tudjman and his Minister of Defense Gojko Sušak in the crimes, than on the facts that would allow showing Gotovina’s responsibility (Gow, Kerr, and Pajic 2014, p. 32). The obsession of the ICTY Chief Prosecutors with Franjo Tudjman and Gojko Sušak figures into Gotovina’s indictment (ICTY, IT-06-90-A), as well as into most of the indictments launched against the Bosnian Croats. The most explicit is the indictment against the former Head of the HDZ in Bosnia Dario Kordić (Vukpalaj, 2010, p. 143). This indictment designates Tudjman and Sušak as a part of the Joint Criminal Enterprise (JCE), jointly responsible for crimes committed by Bosnian Croats in Central Bosnia.

The JCE represents the closest judicial definition of what could be considered as state responsibility. Damgaard (2008, p. 130) considers the JCE as a worrying development in law. According to Bonafe (2009, p. 181), “the JCE supposes a common plan of action (...) and this doctrine can apply to very broad cases in which the Prosecution includes among the members of a criminal enterprise, a large amount of persons, in particular, political or military leaders who have not physically committed any relevant crime, and who are structurally remote from those having materially perpetrated these crimes.” According to Wolf (as cited in Krzan, 2016, p. 30), “the concept of JCE serves as an equivalent for covert state participation in planning and organizing a systematic pattern of crimes.” Nevertheless, Wolf considers that there are two separate concepts of responsibility and that “criminal law responsibility cannot be transferred to the regime of collective state responsibility and vice versa,” and that “the separate concepts of responsibility induce different legal effects: punishment of individuals, on the one hand, and reparation by states, on the other.” The argument of reparation by states has been frequently used by politicians when explaining the acquitting verdicts. Thus, for example, the Prime Minister of Republika Srpska Milorad Dodik commented that the acquittals of the Croatian generals amounted to a political decision that aimed sparing Croatia from a condemnation for a Joint Criminal Enterprise “for the sake of its EU accession.”⁶ This argument has been frequently used in Serbia and in Croatia to explain the acquittals of generals as exoneration for Tudjman’s and Milošević’s regimes. The acquitting verdicts disqualified the JCE. Nevertheless, the Appeals Chamber of the ICTY in its last verdict against the former leaders of Hertzeg-Bosna determined that their crimes were committed within a joint criminal enterprise aimed at establishing “a Croat entity [in Bosnia and Herzegovina], whose borders would partially follow the borders of the Croatian republic from 1939 through the forcible and permanent deportation of the Bosniak population.”⁷

After their acquittal, Ante Gotovina and Mladen Markač, as the highest ranking military and police officers, responsible for Croatia’s most important military victory (*Oluja*), became symbols of the “purity” of the Croatian “Homeland War” (Pavlaković, 2010, p. 1708). Widespread claims of the ICTY being anti-Croatian and an institution that aimed to contest the rightness of the Croatian independence and the “holy homeland War”, ceased with the acquittal of Gotovina and the other Croatian generals. It became an institution that allowed Croatia “to regain its innocence” (Jones, et al., 2014, p. 13). Gotovina told the crowd in the central square of Zagreb, “we won, this is the end”⁸ and euphoric Croats waved national flags and held up photos of the generals alongside banners reading “pride of Croatia”, while patriotic songs blasted from speakers. “Two generals became officially what the majority of the Croatian citizen always thought: heroes and not criminals” (Pavlaković, 2010).

Nevertheless, this triumphal reception of the Croatian generals in Croatia goes beyond simple

5 Zebić, E., Zorić, O., Mihajlović, B., & Cvetković, Lj. (2016, November 16). Croatian joy, Serbian anger at Gotovina acquittal. *IWPR*. Retrieved from <https://iwpr.net/global-voices/croatian-joy-serbian-anger-gotovina-acquittal>

6 Generals acquitted “for sake of Croatia’s EU accession.” (2012, November 16). *B92 TV*. Retrieved from https://www.b92.net/eng/comments.php?nav_id=83191

7 Muslimović, A. (2017, November 29). Bosnian Croats await Hague Tribunal’s final verdict. *BIRN*. Retrieved from <http://www.balkaninsight.com/en/article/bosnian-croats-await-hague-tribunal-s-final-verdict-11-28-2017>

8 Zebic et al., 2016

appearances and has to do with the image that Croatia had projected of itself. The euphoria that accompanied Gotovina's acquittal in Croatia cannot be understood without understanding the events that characterised his indictment in 2001 and his arrest in Spain in December 2005. His indictment was considered to be the result of the obstruction of the Tudjman presidency and of the Croatian Intelligence services, which was directed by Tudjman's son, to cooperate with the ICTY. There was a perception that "Gotovina was being used as a scapegoat for the crimes of Tudjman and others in position of political power" (Gow, Kerr & Pajić, 2014, p. 154). In 1995-1996, Gotovina himself was not allowed to speak to ICTY investigators, which, had he done so, may have allowed him to avoid prosecution.⁹ Several opinion polls conducted in 2005, a few months before he was arrested in Spain, had shown how popular he was. During a broadcast of one of Croatia's most watched political television shows *Latinica*, viewers were asked if they were to encounter Gotovina, would they report him to police or help him hide. Only 8% of the respondents said they would turn him in. 92% said they would help him avoid arrest. Of those who said they would help him, 76% said they believed he was innocent (Pavlaković, 2010, p. 1708). The pressure exerted on Croatia for more than four years to deliver Gotovina to The Hague and the postponing of the opening of accession negotiations with the EU in March 2005 contributed largely to the euphoria in Croatia after the acquittal of the generals. Nenad Ivanković, an adviser of the former Croatian President Tudjman, who in 2001 had published a book on Gotovina, wrote that after his arrest he had become a metaphor for Croatia and that "whatever happened to him happened to all of us, whether we are conscious of it or not, he is unquestionably a symbol and legend of the Homeland War, a symbol for Croatia" (Pavlaković, 2010, p. 1710). After his acquittal, Gotovina was thought to enter politics, as he continued to have strong support, especially from the Croatian right. The right wing newspaper *Express* considered Gotovina to be the Croatian Eisenhower, who must take the leadership of the Croatian Democratic Community (HDZ).¹⁰ However, his relationship with the HDZ was difficult, since in 2001 when he was indicted by the ICTY, Ivo Sanader, then the leader of the HDZ in opposition, had used Gotovina's indictment to orchestrate a strong anti-government campaign to oppose the delivery of the indicted generals to The Hague. This campaign was used by the HDZ to come back to power in 2003. Once in power, "Sanader had ordered the Croatian secret services to arrest and transfer him to The Hague" (Vukpalaj, 2010, p. 271). Gotovina was arrested with the support of the Croatian intelligence on the Canary Islands in December 2005 and transferred to The Hague. After his arrest, Gotovina asked his lawyer not to allow his name to be used for political purposes. When Gotovina was acquitted, Sanader was in prison for corruption, and the HDZ had lost both the presidency and the parliament, both controlled by Croatian social democrats. Furthermore, the head of the HDZ was Tomislav Karamanko, the former head of the Croatian intelligence, who directed the Croatian services when Gotovina was arrested and transferred to The Hague. This explains why the HDZ didn't benefit from Gotovina's acquittal. Nevertheless, Gotovina's acquittal allowed the reinforcement of the Croatian right wing parties that played an important role in the electoral defeat of Ivo Josipović for a second mandate. Despite his popularity, Gotovina refused to officially adhere to a political party, but his regular dinners with Kolinda Grubar Kitarović, the winner of the presidential elections in 2014, indicated his clear support for her and for the HDZ. After she took office, she appointed Gotovina as her adviser for military issues.

Despite the pleasure at the verdicts expressed by the Croatian political elite, the acquittal of the Croatian generals nevertheless posed a problem concerning the prosecution of the crimes committed during and after Operation *Storm*. Many Croatian analysts said that after the end of the euphoria, Croatia will still face a problem answering the question put forth by the ICTY in the verdict about why Operation *Storm* resulted in so many victims. President Josipović and Prime Minister Milanović did not fail to mention in their first public addresses that crimes had been committed during and after Operation *Storm* and that the Croatian judiciary should prosecute

9 Hedl, D. (2012, November 19). General's release poses dilemma for Croatian courts. *Balkaninsight*. Retrieved from <http://www.balkaninsight.com/en/article/generals-release-poses-dilemma-for-croatian-courts/1458/149>.

10 Klauski, T. (2012, November 19). Gotovinu za predsjednika. *Index*. Retrieved from <http://www.index.hr/vijesti/clanak/gotovinu-za-predsjednika/647450.aspx>

the perpetrators.¹¹ The declarations of the highest Croatian politicians used the acquittals of the Croatian generals to prove the “innocence” of the Croatian state, saying that the responsibility for crimes belongs to individual perpetrators. However, in the past there has been a lack of political will to deal with the crimes committed during the 1990s in Croatia. The well-known Croatian lawyer Ante Nobile, who defended several Croats in The Hague, said that the acquittals were a good day for Croatia, but that it does not mean that these people (Serbs) were not killed, that they were not robbed, that their houses were not set on fire. According to him, Croatia must find and prosecute all those who have committed crimes and, additionally, provide compensation for people who were damaged in Operation *Storm* and beyond.¹²

The acquittal of Ramush Haradinaj

The former KLA Commander Ramush Haradinaj was acquitted for the second time by the Trial Chamber of the ICTY on 29 November, 2012. He was initially indicted in March 2005, while he was serving as the Prime Minister of Kosovo. He had been accused of crimes committed by KLA forces under his command during the Kosovo war. On 3 April, 2008, the Trial Chamber of the ICTY acquitted Haradinaj of all charges. However, the Appeals Chamber subsequently quashed Haradinaj's acquittal and ordered a partial re-trial of the case. He spent eight years under indictment and on trial. Haradinaj was judged together with two other combatants. They were all indicted on the grounds that they had cooperated in a Joint Criminal Enterprise (JCE), the purpose of which was to consolidate total control of the KLA over Western Kosovo by a forced removal and mistreatment of civilians who were, or were perceived to have been, collaborating with Serbian forces or were against the KLA (Gill et al., 2013, p. 337). When Carla Del Ponte launched the indictment against Haradinaj in 2004, her goal was to judge him as a sort of “Governor of the Valley of Dukagjin”, who held both civilian and military power.

Following the indictment, Haradinaj stepped down from his position as Prime Minister of Kosovo and surrendered to The Hague in the following days. Nevertheless, even though Kosovo was under UN administration at the time, and the ICTY was under UN auspices, Carla Del Ponte complained several times to the UN Security Council that her office had more difficulties to access documents belonging to the United Nations Mission in Kosovo (UNMIK) than in any other place in the former Yugoslavia. She said that the UNMIK leadership was encouraging a climate which deters witnesses from talking to her investigators when it comes to the Albanian perpetrators (Cutter Patel, De Grief & Waldorf, 2009, p. 90). Christopher Lamont (2010, p. 149) suggests that the indictment of Haradinaj was feared to have the potential to destabilise UNMIK's fragile political order since it met with significant popular opposition. UNMIK was according to him dependent upon the continued support of the local population to carry out its administrative mandate.¹³ As far as the NATO force in Kosovo (KFOR) is concerned, Majbritt Lyck (2009) claims that it has chosen a reactive rather than proactive response to detaining indicted war criminals. Christian Olsson (2007) claims that militaries in external operations have particular vocation to conquer the “hearts and minds of local people,” in the framework of operations of stabilisation. Haradinaj, as a former KLA commander, was very popular in Kosovo, and UNMIK and KFOR needed him too for the militia's demobilisation and transition into the civilian-controlled Protection Corps (Lamont, 2010, p. 147). For the international administration of Kosovo, the disarmament and demobilisation of the ex-KLA combatant was far more important than the prosecution of Haradinaj. A similar situation had occurred in Bosnia after the deployment of the international troops, following the Dayton peace Agreement in 1995. It took more than two years before NATO troops launched their first capture of the indicted persons by the ICTY (Lyck, 2009; Vukpalaj, 2010). There is no doubt that

11 Pavelic, B. (2012, November 16). Croats celebrate acquittal of Gotovina and Markač. *Balkan Insight*. Retrieved from <http://www.balkaninsight.com/en/article/croats-celebrate-acquittal-of-gotovina-and-markac>.

12 Ibid.

13 Amnesty International Report. (2008, January). *Kosovo (Serbia): The challenge to fix a failed UN justice mission*. Retrieved from http://www.amnesty.eu/content/assets/260412_EULEX_Report.pdf. This report points out the failures of United Nation Mission in Kosovo to establish an effective justice system. It is said that: “UNMIK had failed to establish an effective and impartial justice system, with concrete reference to the investigation and prosecution of war crimes.”

prosecutions have sometimes complicated disarmament and demobilisation of former combatants (and vice versa), particularly at the earlier stage. "Prosecutions can make it more difficult to coax combatants and ex-combatants into disarming and demobilizing, if they think they may face legal action" (Cutter Patel, De Grief & Waldorf, 2009, p. 88).

In Kosovo, Haradinaj's second acquittal helped to solidify the narrative that no crimes were committed by Kosovo Albanians. According to Clark (2014, pp. 162-164), former members of the KLA especially insisted that their erstwhile commanders should never have been sent to The Hague, and that "after the acquittal of Haradinaj, when celebrating the event, for many of them, the verdict was too little, too late." Carla Del Ponte was accused of being an Albanian enemy. She was accused not only of having indicted Haradinaj but also of having opposed the independence of Kosovo. Indeed, on several occasions during the time she was Chief Prosecutor of the ICTY, and after she left the ICTY, she declared that she was against the statehood of Kosovo. In an interview with *Radio Swiss Romande*, Del Ponte declared that she was surprised that the international community recognised Kosovo.¹⁴ Her opposition to the independence was certainly considered in Kosovo as evidence of her clear support for Serbia. Hence, the prosecution of the former KLA commanders was interpreted as a way for Del Ponte to contest the legitimacy of the new Republic, through the indictment of the most popular KLA commanders, who were "the very symbols" of this independence. After Haradinaj was acquitted, the Kosovo newspaper *Express* reported calls to launch an accusation against Carla Del Ponte for her "science fiction accusations."¹⁵ According to Clark (2014, 164), Kosovo Albanians didn't regard the ICTY as a biased institution and they didn't consider the Tribunal as being anti-Albanian. Nevertheless, according to her, they accused the Tribunal of having a policy of "balancing" crimes in the region that could create "a distorted version of events." They repeated very often that "Kosovo Albanians were victims of the Serbs and that none of them should have been tried in The Hague (ibid.)."

As with the euphoria that followed the release of the Croatian generals, Haradinaj's acquittal became a national event in Kosovo too. After his acquittal, Haradinaj's popularity was at its peak. He was received with state honours at Pristina Airport by the Prime Minister of Kosovo Hashim Thaci. The aim of Thaci was to prevent Haradinaj from monopolising the narrative of the war and that of the KLA. Haradinaj was aware of that, and his first gesture was to go to Ibrahim Rugova's tomb to pay homage. This was a highly political gesture, since in 2004 he had served for 100 days as the Prime Minister of Kosovo in a coalition with Rugova's Democratic League of Kosova (LDK). Haradinaj declared that his aim was to become Kosovo's Prime Minister.¹⁶ Therefore, he needed the support of his former allies to come back to power. It was a way for him to go beyond the divisions between the former KLA commanders in power and the opposition, lead by LDK. In the end, the public support for Haradinaj was much more a reaction to what was considered "unjust" than to the popularity of Haradinaj himself. Even if Haradinaj was popular in Western Kosovo, his political party The Alliance for the Future of Kosovo (AAK) won only 9.5% of the votes at the next election.¹⁷ Nevertheless, his acquittal was considered by the former combatants as powerful proof that the war of the KLA was a righteous war. Even if very few people criticised Haradinaj's acquittal, some representatives of civil society criticised the welcoming reserved for Haradinaj in Pristina. Bekim Blakaj from the Kosovo Humanitarian Law Centre said that the rallies:

show how narrow-minded our societies are; it shows their readiness to build myths and revere people charged with war crimes as heroes. This goes along with the issue of the society's immaturity and inability to use common sense in weighing facts confirmed in the Court, and how little readiness there is to face the fact that there were victims on the other side as well. Unfortunately, despite a substantial

14 *Radio Swiss Romande*. (2012, November 29). Retrieved from <http://pages.rts.ch/la-1ere/programmes/forum/4451228-forum-du-29-11-2012.html#timeline-anchor-segment-4470768>

15 Bytyqi, F. (2012, December 2). Kosovo demands investigation into ex-U.N. prosecutor Del Ponte. *Reuters*. Retrieved from <https://www.reuters.com/article/us-kosovo-warcrimes/kosovo-demands-investigation-into-ex-u-n-prosecutor-del-ponte-idUSBRE8B10DP20121202>

16 Vuillamy, E. (2012, December 2). Freed Kosovo war chief pledges: I will lead my people once more. *The Observer*. Retrieved from <http://www.theguardian.com/world/2012/dec/02/ramush-haradinaj-kosovo-acquitted>.

17 Kosovo Central Electoral Commission. Retrieved from http://www.kqzks.org/Uploads/Documents/Rezultatet%20sipas%20Subjeketeve%20-%202020140526%20Party%20Results%20-%20Kosovo%20Level_jywcwsfyts.pdf

*body of material with respect to war crime victims of other nationalities, nobody talks about it and would rather forget it. What is more, there are those who would rather forget victims from their own communities just to avoid the issue of war crimes. Each day our societies prove again and again how immature and devoid of human compassion they are.*¹⁸

The acquittal of Momčilo Perišić

On 28 February 2013, the Appeals Chamber of the ICTY acquitted Momčilo Perišić, the chief of the General Staff of the Yugoslav Army from 1993-1998. In 2011, Perišić had been condemned by the Trials Chamber of the ICTY to 27 years in prison for command responsibility in Zagreb and for aiding and abetting in Sarajevo, Srebrenica and Zagreb.

This acquittal is of a particular importance for Serbia, since political elites and the Serbian public opinion have been in the past strongly opposed to any transitional justice and to the ICTY in particular (Lamont, 2010, p. 74).¹⁹ Perišić was the highest military official of Serbia to be judged by the ICTY for crimes committed in Croatia and in Bosnia. The most common arguments linked his acquittal with the previous acquittals of Gotovina and Haradinaj. Human Rights activist Nataša Kandić considered that after the acquittals of the Croatian generals, it was expected that the verdict of Perišić would be of the same tone and it is not a surprise.²⁰ On 1 March, 2013, the regionalist journalistic team of Balkan Insight reported on the reactions of the Bosnian Serb leaders, who unanimously considered the acquittal of Perišić as some sort of compensation for the acquittal of the Croatian generals.²¹

Nevertheless, in Serbia the enthusiasm after Perišić's acquittal was far less than that expressed in Croatia after the acquittal of the Croatian generals. There was no public jubilation or huge public meetings to receive him. The main reason was Serbia's difficult relationship with the ICTY in the past. The Hague tribunal was long considered to be one of the most threatening international institutions to Serbia's security (Milanović, 2015). Therefore, there was no political interest for the Serbian government, composed of the heirs of two most anti-ICTY political parties in the past, the Socialist Party of Serbia and the Serbian Progressives, which was an offshoot of the Serbian Radicals, to give credibility to a tribunal they had fought in the past. In addition, even if Prime Minister Ivica Dačić and his deputy Aleksandar Vučić had changed their position in favour of a pro-EU agenda, in the past, they had seen their mentors (Slobodan Milošević and Vojislav Šešelj) indicted and prosecuted by the ICTY.

The second reason is that Perišić had a specific political career before he was indicted by the ICTY that made it difficult for Dačić and Vučić to benefit from his acquittal. The reason is that after the fall of Milošević in 2000, Perišić joined the team of Zoran Đinđić and served until May 2002 as Serbian Deputy Prime Minister, under the Đinđić government. Đinđić had transformed the cooperation with the ICTY into a constant bargaining with the West to obtain the necessary financial and political support in exchange for the delivery of the indicted persons. It served him to fight the members of the former regime who were still powerful in post-Milošević Serbia. Perišić had joined the team of Đinđić after they had entered in a conflict with Vojislav Koštunica, who controlled the government of the Federal Republic of Yugoslavia. In May 2002, Perišić was arrested in a spectacular intervention of military intelligence services controlled by Koštunica and was accused of being a spy, delivering sensitive information to an American diplomat. The famous

18 Our societies are immature and narrow, Interview with Bekim Blakaj, Executive Director of the Humanitarian Law Center in Kosovo, Heinrich Boll Stiftung. Retrieved from https://rs.boell.org/sites/default/files/uploads/2012/12/bekim_blakaj_our_societies_are_immature_and_narrow.pdf

19 Belgrade Centre for Human Rights. (2002, July). Javno mnjenje Srbije, stavovi prema Haskom Sudu. Retrieved from <http://bgcentar.org.rs/bgcentar/wp-content/uploads/2013/10/Javno-mnjenje-u-Srbiji-i-stavovi-prema-Me%C4%91unarodnom-krivi%C4%8Dnom-tribunalu-za-biv%C5%A1u-Jugoslaviju-u-Hagu-ICTY-2003.pdf>.

20 Reagovanja na presudu Perišiću. (2013, February 28). RTS. Retrieved from <http://www.rts.rs/page/stories/sr/story/9/politika/1275804/reagovanja-na-presudu-perisicu.html>

21 Ristic, M. (2013, March 1). Hague acquits Yugoslav general Perisic of war crimes. *Balkan Insight*.

“Perišić affair” was presented as a major spy scandal in Serbia by Koštunica’s team. In an interview granted to the Serbian daily *Danas* in July 2015, he confirmed that “the chief prosecutors came to talk to me in Belgrade (...) he wanted me to testify against Slobodan Milošević in The Hague but I didn’t want to speak lies, and I told him that I couldn’t be used against Milošević.” According to him, the pressure continued after he was indicted. He said that he was offered a deal by the Prosecutor, “to testify against Milošević, and in return I would get a minimum sentence of 11 years, which would then be reduced to seven.”²² In their Book, Del Ponte and Sudetic (2009) confirm Perišić’s refusal to testify against Milošević in The Hague and describe the meeting with Perišić in Zoran Đinđić’s office on April 18, 2002:

I went with my aide, Anton Nikiforov, to the office of Serbia's prime minister (...) and there, sitting in an armchair and dressed in a suit, waited General Perišić. This was to be a secret meeting. Đinđić had arranged it to give me an opportunity to make a personal appeal to Perišić to testify against Milošević (...) Perišić explained that participating in the Milošević trial in The Hague would violate his political and moral code, because Milošević should have been tried in Serbia, not in The Hague. He stated that he would be willing to testify against Milošević during a trial in Serbia “for what he had done to the Serbs” (p. 171).

The third reason why his acquittal provoked less euphoria in Serbia than those of Gotovina and Haradinaj in their countries is due to the difficult relationship he had in the past with the two leaders of the Progressive party in power in Serbia – Tomislav Nikolić and Aleksandar Vučić. When he voluntarily went to The Hague, Perišić was accused by Nikolić and Vučić of being a traitor and an American spy. A week after Perišić was acquitted, the Serbian weekly newspaper *Vreme*, ran the headline “the return of the written off comrade.”²³

In Bosnia and among Bosniaks, the reactions to Perišić’s acquittal were particularly shocking.²⁴ The reason was that they considered Serbia to be the mastermind behind the crimes committed in Bosnia. As Perišić was the top figure within the Yugoslav Army, his conviction in 2011 was immensely significant to Bosniaks.²⁵ Criticism became stronger after some analysts reproached the Tribunal for creating new and restrictive standards for command responsibility, which made convictions next to impossible.²⁶ This question of the responsibility of army commanders became particularly embarrassing in June 2013 after the Danish judge of the ICTY Frederick Harhoff accused the President of the Tribunal and Appeals judge Theodore Meron of putting pressure on the Appeals Chamber judges to acquit Gotovina and Perišić. This cast a doubt on the integrity of the decision-making process (Keil & Perry, 2015; Clark, 2014). Danish media published Harhoff’s letter, in which he criticised recent judgments and accused Theodor Meron of having rendered the verdicts under the pressure of “military establishments.”²⁷ According to Harhoff, “you would think that the military establishment in leading states (such as USA and Israel) felt that the court in practice were getting too close to military commanders’ responsibilities...,” by avoiding the conviction of a Serbian or Croatian army commander for crimes committed by his subordinates in Bosnia or Croatia. The aim of Meron was, according to Harhoff, to avoid creating a dangerous legal precedent. According to Orentlicher (2018, p. 186), even if “Harhoff’s speculation about American-Israeli influence was just that,” in the eyes of many Bosnians, “it was the proverbial smoking gun.” After that, fifteen victims’ associations in Bosnia wrote a letter to judge Meron demanding his resignation (SENSE, 2013, p. 2).

22 Živanović, K. (2015, June 28). Išao bih u Srebrenicu da se poklonim senima i muslimanskih i hrvatskih, ali i srpskih žrtava. *Danas*. Retrieved from <https://www.danas.rs/drustvo/isao-bih-u-srebrenicu-da-se-poklonim-senima-i-muslimanskih-i-hrvatskih-ali-i-srpskih-zrtava/>

23 Svarm, F. (2013, March 7). Povratak otpisanog saborca. *Vreme*. Retrieved from <http://www.vreme.com/cms/view.php?id=1102285>

24 BiH podijeljena u reakcijama na oslobađanje Perišića (2013, March 1). *Balkan Insight*.

25 Karabegović, D. & Zorić, O. (2013). Bosnian Consternation at Serbian Security Officers. *IWPR*. Retrieved from <http://iwpr.net/report-news/bosnian-consternation-serbian-security-officers-acquittal>

26 Gordy, E., (2013, March 1). Hague verdicts allow commanders to evade justice. *Balkan Insight*. Retrieved from <http://www.balkaninsight.com/en/article/hague-verdicts-allow-commanders-to-evade-justice/1458/3>

27 Andersen, S. (2013, June 13). Murderers are allowed to go free. *BT*. Retrieved from <https://www.bt.dk/udland/english-version-murderers-are-being-allowed-to-go-free>

The acquittal of Jovica Stanišić and Franko Simatović

On May 30 2013, ten years after their indictment, the Trial Chamber of the ICTY acquitted the former head of the Serbian security services Jovica Stanišić and his right-hand man Franko Simatović, commander of the ministry's Special Operations Unit. Jovica Stanišić was the first intelligence chief of a country to be judged by an international criminal tribunal. The trial focused on the responsibility of the Serbian state intelligence services in the war in Croatia and Bosnia. The indictment stated the responsibility of the Serbian secret services in these conflicts (ICTY IT-03-69). Serbian secret services had controlled, trained and armed most of the paramilitary groups that operated in Croatia and Bosnia. According to Armatta (2010, p. 139), "for Serbia, acting through paramilitary formations was a solution for "war without war," and the persistently repeated claim that Serbia was not at war." A documentary by the Serbian independent weekly *Vreme* on 5 March, 2009, also described in detail how the most brutal paramilitary forces (Knindzas, Tigers, and Scorpions) were trained and controlled by Stanišić and Simatović. In order to bypass his government, Milošević empowered Stanišić, who reported directly to him.

The ICTY became interested in Stanišić after Milošević was transferred to The Hague. It wanted to use Stanišić as a witness against him. The Tribunal needed credible witnesses and Stanišić, as the closest collaborator of Milošević until 1998 and as a man who had been of behind the scenes, could play an important role as a potential witness. In 2001, the ICTY investigators held a series of meetings with Stanišić to try to convince him to testify against Milošević. Stanišić refused to testify directly, but offered cooperation in the form of information and documents that could be valuable for the Prosecution; in exchange for immunity, of course.²⁸ Stanišić did not respect the deal, and in autumn 2001 The Hague investigators threatened him with an indictment. However, all sides knew it would be difficult to prove his guilt. In the end, it was the assassination of the Serbian Prime Minister Zoran Đinđić in March 2003 that changed Stanišić's destiny. Stanišić and Simatović were the founders of the Red Berets, the Serbian Special Operations Unit, which played a key role in the assassination of Đinđić. Even if they were not implicated in the assassination, they were among the first people to be arrested after the murder. Having maintained links with these groups, Stanišić was viewed as a "dangerous detainee" who was very influential in Serbia (Ostojic, 2014). This is the reason why the government wanted to get rid of him (Lamont, 2010, p. 71). Carla Del Ponte wrote in her book that "within days of the Djindjić murder, Stanišić and Simatović had found themselves in local police custody; but the Belgrade authorities had been so afraid of these two police operatives that Minister of Interior Dušan Mihajlović and Foreign Minister Goran Svilanović had practically begged me to finish the indictments against the two men so Belgrade could transfer them to The Hague" (Del Ponte & Sudetic, 2009, p. 428). She wrote that on 2 April, 2003, one month after Đinđić's assassination, she met secretly in The Hague with Goran Svilanović and Dušan Mihajlović, respectively, the Serbian foreign and interior ministers, who requested her to reveal to them the list of future potential indictments. She reports that the objective of their request was either to avoid the indictments of Serbian army and police generals, who had assisted the police crackdown that had followed the Djindjić assassination, or to allow their judgment in Serbia. The Office of the Prosecutor was completing the indictments against Sreten Lukić, Nebojša Pavković, Vladimir Lazarević, and Momčilo Perišić. On the other hand, the Serbian ministers asked her to accelerate the completion of indictments against the former heads of the Serbian intelligence Stanišić and Simatović. In their book, Del Ponte and Sudetic wrote:

Foreign Minister Svilanović stepped in and diverted the conversation away from discussion of the generals. He said the government wanted as quickly as possible to transfer to the Tribunal two of the Office of the Prosecutor's key targets, men who had for years handed down orders to Luković and the Red Berets. These targets were Jovica Stanišić and Frenki Simatović, who had been swept up by Operation Saber. "We can't hold them for long," Svilanović explained, urging us to indict them. "Speed it up, so we can send them to The Hague." (...) I agreed with no hesitation to accelerate completion of the indictments against Stanišić and Simatović (p. 217).

28 Anastasijević, D. (2009, March 5). Nas covek u Beogradu. *Vreme*. Retrieved from <http://www.vreme.com/cms/view.php?id=835376>

The indictment against them was launched on 1 May 2003, one month after the assassination of Zoran Djindjić. They were transferred to The Hague on 11 June, 2003. Simatović was transferred two weeks earlier. According to Gow and Zverzhanovski (2013, p. 30), "it took an event of the magnitude of the Đinđić assassination to kick start reforms in the security sector," and the transfer to the ICTY detention unit of Jovica Stanišić and Franko Simatović was an important step.

Their acquittal did not provoke euphoria in Serbia, although Stanišić had been the country's second most powerful figure after Milošević during the 1990s. This is probably the reason why Serbian politicians were much more cautious. By 1990, Serbian politics, the media and the secret service were all under Milošević's control, and Stanišić played a key role in organising and coordinating the control over the media and the opposition. Stanišić was the symbol of the criminalisation of the Serbian society during the 1990s, who had sent thousands of ordinary criminals, very often taken from prisons, to Bosnia and Croatia. In Serbia, the years when he was in office were accompanied by assassinations and intimidations of those who opposed the regime. Parallel to the control taken over the opposition as well as the Serbian leadership in Croatia, Bosnia and Montenegro, the services were used to ensure electoral victories by the Socialist Party of Serbia.²⁹ Stanišić had opened the doors of the state services to thieves and murderers, who extorted and occasionally killed under the protection of the Services.³⁰ This is the reason why their acquittal was not widely greeted in Serbia. Another reason was that the Serbian media covered the reports of the *Los Angeles Times* from 1 March, 2009, disclosing that Stanišić had been, for more than eight years, the CIA's main man in Belgrade, and that he had provided information on the locations of NATO hostages, aided CIA operatives in their search for grave sites, and helped the agency set up a network of secret bases in Bosnia. Strong anti-Americanism in Serbia made Stanišić a "traitor" to the national cause and a spy, who was not working for Serbia but for the Americans. Nevertheless, after the acquittal Prime Minister Ivica Dačić said that Stanišić's acquittal was of a great importance for the Republic of Serbia, and that the Government of Serbia advocated and advocates for fair trials before The Hague Tribunal. It is, according to him, "the only way to establish the truth about crimes and create conditions for reconciliation to ensure peace and stability in the region."³¹ This is a completely different declaration from those given by his predecessors, who accused the Tribunal of being a political institution. It was important for the Tribunal to get a positive opinion in a country where it was long considered a threat to the population. The same media reported on criticism of this acquittal by civil society and human rights defenders like Nataša Kandić and Sonja Biserko, who considered that the acquittal of Stanišić and Simatović would serve the "negationists", who claimed that Serbia was not at war. Kandić said to Radio Deutche Welle that she was astonished by these acquittals since, according to her, the Serbian paramilitary units in Croatia and Bosnia and Herzegovina were not free organisations that have been armed without Serbia's state Security Services being aware. Kandić considered the last acquitting verdicts of the ICTY as a deviation from the obvious facts. She said that it is clear that Serbian paramilitary forces were created to commit war crimes. According to her, this was proved during the trial of the paramilitary group Scorpions in Belgrade, after a video was discovered showing them executing young Muslims in 1992, in Bosnia. Serbian civil society activists considered Stanišić's acquittal as amnesty of the Serbian intelligence services who had controlled these groups. The leader of an opposition party (Social Democratic Union) Žarko Korać declared that it was hard to believe that "people who were, to use an expression of the writer Joseph Conrad, "the Heart of Darkness" of the Milošević regime, are now free."³²

29 Ibid.

30 Ibid.

31 Ristic, M. & Pavelic, B. (2013, May 31). Freed Serbian security officials return to Belgrade. *Balkan Insight*. Retrieved from <http://www.balkaninsight.com/en/article/belgrade-awaits-freed-state-security-officials/1458/149>

32 Simatović i Stanišić bili su 'Srce tame' Miloševićevog režima. (2013, May 30). *Index*. Retrieved from <http://www.index.hr/mobile/clanak.aspx?category=hot&id=680589>

Conclusions

This paper attempted to show the political backgrounds and internal political contexts in Croatia, Serbia and Kosovo, following the return to officials acquitted by the ICTY to their countries in 2012-2013. The acquittals of the senior Serbian, Croatian and Kosovo officials in 2012-2013 were not viewed “in narrow legal terms – that is, not merely as a finding that the evidence presented to the Tribunal was not sufficient to establish the elements of the crime beyond a reasonable doubt” (Combs, 2017, pp. 229-230). Domestic politicians and their supporters used the acquittals to legitimise exclusive narratives of war and, therefore, to achieve goals quite different from those that acquittals have in legal processes, where they testify the fairness and legality of cases. Transitional justice is always connected with convictions – punishment, justice, truth, and then reconciliation. Victims refused to approve the acquittals and considered the lack of conviction as repudiating their status. For the supporters of the Tribunal, these acquittals undermined “the value and viability of international trials as a centerpiece response to mass atrocities” (Combs, 2017). The paper further shows that by turning the acquitted officials into victims domestic politicians prevented any kind of debate about the wars of the 1990s and contributed to the strengthening of the ethnic interpretation of the past. Kostovicova (as cited in Waters, 2014, p. 249) pointed out that “many Serbs, Croats, and Bosniaks – and Albanians – have been loath to see their own co-nationals in the dock answering for acts committed in their name. Consequently, they hailed accused war criminals going to The Hague as heroes, dismissed the ICTY as biased – even as an international conspiracy - while invoking exclusively their own suffering and victimhood.” The acquittals strengthened this interpretation of the past; furthermore, they became the legitimising argument.

When analysing International Criminal Tribunals, Clark (2008, p. 332) claims that tribunals can help the reconciliation process in three particular ways, “by seeing that justice is done; by establishing the truth about crimes committed; and by individualizing guilt.” The analysis of the acquittals shows that justice is done only for those who consider that members of their own ethnic group didn’t commit crimes. Human rights activists in all these three countries pointed out the lack of justice being done. Victims’ associations considered that truth was not established. Domestic politicians made the individualisation of guilt impossible. The article further shows that the ICTY was not only a court of justice but it exercised an important political function, in part because of its “potential ability to marginalize recalcitrant nationalist politicians and military elites” (Hazan, 2004, p. 52; Lamont, 2010, p. 50). The Tribunal was dependent on local governments not only to obtain the delivery of the indicted persons to The Hague, but also to obtain the necessary documents for trials, as well as to protect the potential witnesses, etc. This gave local politicians considerable power to negotiate with prosecutors. According to Peskin (2008, p. 121), “whenever possible, the government preferred to delay a tribunal’s request for assistance in order to better gauge the fallout of cooperation or resistance.” Nevertheless, the post-conflict contexts and dependency on local politicians had the effect of weakening the aims of international criminal justice.

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